

BUREAU OF LAND MANAGEMENT

v.

BURGHARDT CO.

IBLA 92-75

Decided March 20, 1997

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer affirming as modified and reversing in part final decisions of Associate District Manager, Boise District, Idaho, Bureau of Land Management, temporarily suspending and permanently cancelling grazing privileges. ID 01-89-01, ID 01-90-02.

Affirmed as modified.

1. Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

The BLM properly penalizes a grazing permittee for unauthorized grazing on the public lands. However, a 2-year suspension of all fall/winter grazing privileges in two allotments (i.e., 11 percent of all permitted grazing use) and a permanent cancellation of all grazing privileges in one allotment will each be deemed too severe where, although the current trespass was willful and repeated, the duration of the trespass was fairly short. In such circumstances, the penalty will be modified commensurate with the violation, but designed to reform the trespasser's behavior.

2. Grazing Permits and Licenses: Cancellation or Reduction—Grazing Permits and Licenses: Trespass

In determining the severity of a reduction in grazing privileges, the reduction must be gauged in terms of its impact on all of the grazing use authorized under a particular grazing permit. The aim is not to target the offending grazing use, but by curtailing all or part of a permittee's nearby permitted use, to reform the permittee's grazing practices in that area. The BLM may suspend or cancel all or part of a trespasser's grazing privileges under other permits, whether in one or more grazing districts or in one or more states.

APPEARANCES: David R. Samuelsen, Esq., Boise, Idaho; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

The Bureau of Land Management (BLM) has appealed from a September 30, 1991, decision of Administrative Law Judge Harvey C. Sweitzer affirming as modified the May 8, 1989, decision, and reversing in part the April 26, 1990, decision, of the BLM Associate District Manager, Boise District, Idaho. The 1989 decision temporarily suspended the fall/winter grazing privileges of the Burghardt Company (Burghardt) in the Castle Creek (No. 0801) and Battle Creek (No. 0802) allotments. The 1990 decision permanently cancelled Burghardt's fall/winter privileges in the Battle Creek allotment.

The allotments, which border Burghardt's private land, known as the "Rock House Field," on the north and west (Castle Creek) and on the south and east (Battle Creek), encompass thousands of acres of public land in Owyhee County, Idaho. The private land is, in all important respects, fenced off from the public land in the allotments. Tr. 17; Exs. 1 and 13. Cattle are authorized to graze in the allotments during a 3-month period in the fall and winter of each year (normally November 1 to January 31). 1/ Ex. 3 at 1. Such authorized grazing use consists of a total of 276 animal unit months (AUM's) 2/ in the Castle Creek allotment and 66 AUM's in the Battle Creek allotment. The record shows that Burghardt's total active grazing use is 3,051 AUM's in the Boise District, and 1,407 of those AUM's are allocated to the Castle Creek (1,341 AUM's) and Battle Creek (66 AUM's) allotments. Ex. 3 at 1. The fall/winter grazing use in the Battle Creek allotment constitutes all of Burghardt's authorized use in that allotment. The total authorized use comprises 276 AUM's in the fall/winter, 748 AUM's in the spring/summer (April 1 to June 30) and 317 AUM's in the summer (July 1 to August 30).

On February 21, 1989, the Area Manager, Bruneau Resource Area, Idaho, BLM, issued a decision in which he proposed to suspend Burghardt's fall/winter grazing privileges in the two allotments for a period of 2 years, effective April 1, 1989. The Area Manager stated that suspension was "compelled" because of repeated acts of willful and nonwillful

1/ The fall/winter season for the Castle Creek allotment was changed by BLM to Oct. 24, 1988, through Dec. 18, 1988, for 92 cattle. Tr. 24; Ex. 4 at 1. The 1989-90 season of use for the Battle Creek allotment was changed to Oct. 27, 1989, to Jan. 26, 1990. Ex. 5 at 1.

2/ An AUM's is the amount of forage necessary to sustain one cow for 1 month. 43 CFR 4100.0-5.

trespass during the fall/winter grazing season, culminating in a "blatant" willful trespass in October 1988. ^{3/} Area Manager's Feb. 21, 1989, Proposed Decision at 1. In the latter instance, the Area Manager stated that Burghardt had "willfully allow[ed its privately-owned] cattle to graze on public land without a permit, and at a time different than [sic] that authorized." Id. Burghardt verbally objected to the proposed suspension. Finding that "no new information" had been provided, the Associate District Manager suspended the grazing privileges effective July 1, 1989. Associate District Manager's May 8, 1989, Decision at 1.

On February 12, 1990, the Area Manager issued a second decision in which he proposed to permanently cancel Burghardt's fall/winter grazing privileges in the Battle Creek allotment effective November 1, 1990, due to repeated acts of trespass that had occurred since his May 1989 decision suspending such privileges and those in the Castle Creek allotment for 2 years. The Area Manager stated that Burghardt had "repeatedly and willfully allow[ed its privately-owned] cattle to graze public land without a permit, in excess of number authorized, and in an area different from that authorized." Area Manager's Decision of Feb. 12, 1990, at 1. He specifically referred to an act of repeated willful trespass (ID-016-3448) that occurred on December 18, 1989, on the Battle Creek allotment that was settled by Burghardt. The Area Manager also referred to an act of nonwillful trespass (ID-016-3442) committed with respect to the Castle Creek allotment on October 6, 1989, which also had been settled by Burghardt. Burghardt objected to the proposed cancellation. Finding that "no new information" had been provided, the Associate District Manager cancelled the grazing privileges effective November 1, 1990. Associate District Manager's Apr. 26, 1990, Decision at 2.

Burghardt's appeals from the Associate District Manager's decisions were consolidated for hearing. Following the hearing on December 4 and 5, 1990, Judge Sweitzer issued his September 1991 decision. In it, he affirmed the May 1989 BLM decision to temporarily suspend Burghardt's fall/winter grazing privileges in the Castle Creek and Battle Creek allotments, but reduced the penalty imposed to a 15-percent reduction of the fall/winter grazing privileges for 2 years. ^{4/} Judge Sweitzer also

^{3/} The Area Manager referred to the following acts of trespass committed with respect to the two allotments: ID-016-3307 (Nonwillful), Dec. 14, 1984; ID-016-3323 (Repeated Nonwillful), Sept. 23, 1985; ID-016-3331 (Repeated Nonwillful), Feb. 6, 1986; ID-016-3355 (Repeated Nonwillful), Nov. 12, 1986; and ID-016-3421 (Willful), Oct. 17, 1988. Each of these trespasses had been settled by Burghardt. Tr. 297-98.

^{4/} Judge Sweitzer stated that the 2-year reduction was to be applied to Burghardt's "grazing privileges in the Castle Creek and Battle Creek allotments." Decision at 12. At first glance, this might be interpreted as applying to all of its grazing privileges in the two allotments, i.e., 1,407 AUM's. This would constitute a reduction of 211 AUM's. When the record is considered as a whole, however, it is apparent that such is not

affirmed the April 1990 BLM decision to the extent he sustained the finding of a willful repeated trespass on the Battle Creek allotment, but again, reduced the penalty from permanent cancellation of 66 AUM's in the Battle Creek allotment to a suspension of those grazing privileges for 2 years, to run concurrently with the 15-percent reduction. However, he reversed the April 1990 decision to the extent that it found that Burghardt had trespassed in an unauthorized area in December 1989.

The BLM also has appealed Judge Sweitzer's September 1991 decision. From the parties' appeal briefs, it is clear that they do not challenge Judge Sweitzer's view of the law applicable to the case. The BLM questions whether Judge Sweitzer correctly concluded that the penalties imposed by BLM were too harsh. In the alternative, BLM argues that even if the short duration of the trespass properly requires a reduction, it does not warrant a reduction to the extent of that ordered, because it represents only 1.67 percent of Burghardt's total privileges in the Boise District, and 3.6 percent of its active privileges in the Castle Creek and Battle Creek allotments. The BLM suggests that the Judge's conclusion that the penalties were too harsh cannot be sustained when viewed in terms of Burghardt's total grazing privileges in the Boise District, or even on the basis of total privileges in the Castle Creek and Battle Creek allotments. Lastly, BLM questions Judge Sweitzer's ruling that BLM failed to prove by substantial evidence that Burghardt's use in the Battle Creek allotment was restricted to the area south of the Shoofly Cutoff Road.

[1] There is no question that BLM is authorized by the Taylor Grazing Act, as amended, 43 U.S.C. §§ 315-315r (1994), and section 402(a) of the Federal Land Policy and Management Act of 1976, as amended, 43 U.S.C. § 1752(a) (1994), and their implementing regulations, to suspend or cancel grazing privileges, in whole or in part, where a permittee has allowed cattle to graze in trespass on public lands, in violation of 43 CFR 4140.1(b). 43 CFR 4170.1-1(a); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1401-04 (10th Cir. 1976); BLM v. Holland Livestock Ranch, 39 IBLA 272, 299-301, 86 Interior Dec. 133, 148-49 (1979), aff'd, Holland Livestock Ranches v. United States, No. R-79-78-BRT (D. Nev. Aug. 7, 1979), aff'd, 655 F.2d 1002 (9th Cir. 1981). Departmental regulation 43 CFR 4140.1(b) specifically provides for the imposition of civil penalties under

fn. 4 (continued)

the case. When Judge Sweitzer referred to Burghardt's grazing privileges in the two allotments, he meant only the fall/winter grazing privileges. His determination that a suspension of 66 AUM's amounted to a 19-percent reduction of Burghardt's use in the two allotments can be correct only if it refers to the 342 AUM's allocated to the fall/winter grazing privileges. Moreover, it is clear that Judge Sweitzer viewed his initial reduction in privileges for the 1988 trespass as amounting to 51 AUM's (i.e., 15 percent of 342 AUM's), which justified increasing the penalty to 66 AUM's for the second act of willful trespass.

43 CFR 4170.1 where privately-owned cattle are allowed to graze on the public lands "[w]ithout a permit" or "[i]n an area or at a time different from that authorized." The BLM is permitted to suspend or cancel grazing privileges in the case of a nonwillful trespass. 43 CFR 4170.1-1(a). However, BLM is required to suspend or cancel grazing privileges in the case of a repeated willful trespass. 43 CFR 4170.1-1(b); Holland Livestock Ranch v. United States, 588 F. Supp. 943, 947 n.4 (D. Nev. 1984).

We start with Burghardt's October 17, 1988, trespass, which the Area Manager concluded was willful. That conclusion furnished the basis for his February 1989 proposed decision to suspend Burghardt's grazing privileges: "Given the repetitive nature of your trespasses and the most recent, blatantly willful trespass of 10-17-88, I feel compelled to initiate civil penalties against the Burghardt Company." The decision was upheld by the Associate District Manager in his May 1989 decision.

According to BLM, on the morning of October 16, 1988, 94 cattle were observed by Jerry Taylor, a BLM Supervisory Range Conservationist, returning from the Castle Creek allotment to Burghardt's private lands through an open gate near the western boundary of those lands at the intersection of Mud Flat and Shoofly Cutoff Roads. Tr. 166-69, 172, 177; Exs. 1, 11, and 13. The gate had been open for some time because it was found imbedded in the ground and cattle droppings were on it. Tr. 176-77; Ex. 11. Recent cattle tracks were observed leading up to the gate from the private lands. Tr. 167, 172, 173, 176-77; Exs. 11 and 13. At the time of the incident, Burghardt was not authorized to have any cattle in the Castle Creek allotment, since the winter season of use ran from October 24 through December 18. 5/ Ex. 3 at 1. Accordingly, Judge Sweitzer found that the October 1988 trespass had occurred. That finding is affirmed, as it is supported by a preponderance of the evidence introduced at the hearing. Eason v. BLM, 127 IBLA 259 (1993).

The Area Manager's finding that Burghardt had engaged in a repeated willful trespass on December 18, 1989, also was based on Taylor's observation of 121 cattle returning from the Battle Creek allotment to Burghardt's private lands through open gates along the northern boundary of those lands and along the eastern boundary (where the Shoofly Road crosses it). Tr. 112, 125-28, 129-30, 196-97, 201, 203-04, 205-07; Exs. 1 and 13. At the time of the incident, Burghardt was authorized to have only 22 cattle on the Battle Creek allotment. 6/ Ex. 3 at 1.

Judge Sweitzer found that the December 1989 trespass in fact had occurred. He found that although Burghardt was authorized to graze the Battle Creek allotment in December 1989, the number of cattle exceeded the authorized number by 99. Decision at 5. That finding is supported

5/ See note 1.

6/ Id.

by a preponderance of the evidence. Eason v. BLM, *supra*. Judge Sweitzer rejected BLM's conclusion that 121 cattle were in trespass on the Battle Creek allotment because they were "in an area different from that authorized." Decision at 5. Specifically, BLM had argued that the cattle were authorized to graze in the allotment only south of the Shoofly Road, which cuts across the allotment, but they were found grazing north of the road. Tr. 207, 236; Exs. 1 and 13. Judge Sweitzer could find no such restriction in Burghardt's 1988-90 grazing permit and found the evidence offered regarding an oral understanding between BLM and Burghardt to that effect "conflicting." Decision at 5. He therefore reversed the Associate District Manager's April 1990 decision to the extent that it determined otherwise. As noted, BLM disputes that aspect of Judge Sweitzer's September 1991 decision. BLM Brief at 5. The record supports Judge Sweitzer's finding that the evidence was conflicting and insufficient to establish that Burghardt's use was restricted to the area south of the Shoofly Cutoff Road. Decision at 5, referring to Tr. 130, 131, 162, 327, 357, 361-63.

Burghardt's permit makes no reference to restricted use. However, BLM points to a statement contained in the "billing notice" for the billing period November 1, 1988, to January 31, 1989: "All use in Battle Creek Allot[ment] to be made south of Shoofly Road." BLM Brief at 5, referring to Ex. 4 at 1. This is not persuasive.

Assuming a billing notice is a grazing use authorization, BLM's reliance on it is misplaced, because no provision limiting use to an area south of the Shoofly Road appears in the billing notice for the period in question. Ex. 5 at 1. That billing notice limits use to "established use areas," but this undefined reference is too ambiguous to serve as a basis for an enforcement action, particularly when the restriction could be reliably established by articulating it in the grazing permit as applicable law requires. 43 U.S.C. § 315b (1994); 43 CFR 4130.2(a). We therefore affirm Judge Sweitzer's September 1991 decision to the extent that he reversed the Associate District Manager's April 1990 decision finding a trespass of 121 cattle north of the Shoofly Road in the Battle Creek allotment in December 1989.

While at the hearing Burghardt did not challenge BLM's finding that it had trespassed on the public lands in the Castle Creek and Battle Creek allotments in October 1988 and December 1989, it did contend that the trespasses were not willful. Burghardt's Post-Hearing Brief at 27. As Judge Sweitzer correctly stated in his decision, a trespass will be considered willful where the evidence "objectively shows that * * * [the trespasser's] conduct was so lacking in reasonableness or responsibility that it became reckless or negligent." Decision at 5 (quoting from Eldon Brinkerhoff, 24 IBLA 324, 338, 83 Interior Dec. 185, 191 (1976)). That standard was adopted in Holland Livestock Ranch v. United States, *supra* at 1006-07. Judge Sweitzer thus found that Burghardt's conduct leading to the trespasses in October 1988 and December 1989 amounted to negligence, and therefore sustained BLM's finding of willfulness. Decision at 8. We affirm the finding.

Burghardt failed to present any specific evidence in support of the suggestion that the trespasses occurred because the gates in the fences along the boundaries of its private land were left open by hunters or others. Burghardt also stated that the trespasses resulted from inadequate cattle guards, a factor that was beyond its control, because BLM would not provide the necessary funds to improve the guards. Like Judge Sweitzer, we are not persuaded that the trespasses are attributable to inadequate guards. The cattle guard along the eastern boundary of the private land was replaced in 1986, prior to the trespasses at issue here. Tr. 376. However, the cattle guard on the western boundary near the intersection of the Mud Flat and Shoofly roads was not replaced until after the last trespass. Tr. 273-74, 317, 336. Thus, even if we assume that the October 1988 trespass is attributable to that guard, we agree that Burghardt was negligent in failing to improve this guard when Burghardt knew prior to the trespass that the guard was inadequate and repeatedly had been informed by BLM that BLM could not allocate funds to replace it since it was located on private land. Decision at 7-8.

The BLM argues, however, that the trespasses were the result of deliberate action on the part of Burghardt rather than negligence. It bases this inference on the contention that the "incidence [sic] of the gates being opened and closed fits the grazing practices that benefited [Burghardt] too closely to be the random work of hunters [or others]." BLM Post-Hearing Brief at 6. Although the evidence showed that when the gates were open, the cattle would graze on the public land during the evening and return to the private land for water during the day as they did during authorized grazing, in our view the evidence does not prove BLM's inference that Burghardt intentionally opened the gates. Tr. 72-73, 128-29, 162-63.

Lastly, Burghardt contended before Judge Sweitzer that the penalties imposed by the Associate District Manager in his May 1989 and April 1990 decisions were "too severe." Applying the test enunciated in Eldon Brinkerhoff, *supra* at 337, 83 Interior Dec. at 190 (quoted with approval in Holland Livestock Ranch v. United States, *supra* at 1005), Judge Sweitzer agreed. Decision at 10, 11.

The Brinkerhoff test provides that a "severe reduction" in grazing privileges (*i.e.*, a permanent loss of privileges or a temporary loss of significant privileges for a period of years) will be imposed in cases involving the following elements: "(1) the trespasses were both willful and repeated; (2) they involved fairly large numbers of animals; (3) they occurred over a fairly long period of time; and (4) they often involved a failure to take prompt remedial action upon notification of the trespass." Eldon Brinkerhoff, *supra* at 337, 83 Interior Dec. at 190. As noted above, there is no dispute regarding the law or decisions that govern this case.

In the case of the October 1988 trespass, Judge Sweitzer correctly found that it was "repeated" because Burghardt had a history of similar trespasses in the area. Decision at 9-10. To constitute a "willful and repeated" trespass, the current trespass must be willful and the trespasser must have committed prior acts of trespass (whether willful or nonwillful).

John E. Walton, 8 IBLA 237, 239 (1972). It does not mean that the current trespass must be repeated willfully, *i.e.*, that a willful trespass was preceded by one or a series of other willful trespasses. Indeed, at the time Brinkerhoff was decided, the Department had long recognized "willful" and "repeated" to be independent bases for disciplinary action. 43 CFR 9239.3-2(e) (1975); Edmund Walton, A-31066 (May 27, 1969) at 5. In the present case, it is undisputed that prior to October 1988 Burghardt had committed a series of nonwillful trespasses between December 1984 and November 1986 on the Castle Creek and Battle Creek allotments. Tr. 191-92, 195-96, 297-98. The October 1988 trespass therefore must be deemed repeated.

In that regard, BLM points to testimony that Burghardt's cattle were entering the public lands at various times during October 1988 as evidence of a repeated trespass in that month alone. *See* SOR at 1-2, 3. However, BLM did not charge Burghardt with a repeated trespass based on various acts of trespass in October 1988, and thus it could not rely on these acts to find a repeated trespass. Calvin C. Johnson, 35 IBLA 306, 322 (Stuebing, A.J., concurring in part and dissenting in part) ("[A] finding of repeated trespass or 'history' of trespass based on charges later dropped would be incorrect"). Even so, this does not negate the finding of repeated trespass in October 1988.

We have discussed our reasons for sustaining Judge Sweitzer's findings that 94 cattle is a large number of cattle, that the 1-day period of the trespass was brief, and that Burghardt failed to take prompt remedial action to correct the trespass circumstances, having failed to do so until two more trespasses had been charged and more than a year had passed. Thus, three of the four Brinkerhoff elements are present and we turn now to the question of whether the penalties imposed by BLM were too severe in the circumstances of this case.

[2] In determining the severity of a reduction in grazing privileges, the reduction must be gauged in terms of its impact on all of the grazing use authorized under a particular grazing permit. This is so whether the reduction affects authorized use in a particular allotment, Eldon Brinkerhoff, *supra*, Holland Livestock Ranch, 52 IBLA 326, 88 Interior Dec. 275 (1981), and John E. Walton, *supra*, or in several allotments, J. Leonard Neal, 66 Interior Dec. 215 (1959). 43 CFR 4170.1-1(a). The objective is to reform a permittee's grazing practices in that area by curtailing all or part of a permittee's nearby authorized use. This is not to say that BLM may not in appropriate circumstances suspend or even cancel all or part of a trespasser's grazing privileges under other permits, whether in a particular grazing district or other districts in a particular state (or even other states).

We find that the record in this case supports Judge Sweitzer's conclusion that a suspension of all of Burghardt's fall/winter grazing privileges in the Castle Creek and Battle Creek allotments (*i.e.*, 342 AUM's) for 2 years constitutes a "temporary loss of significant privileges for a period of years." Eldon Brinkerhoff, *supra* at 337, 83 Interior Dec. at 90. As the parties have acknowledged, this amounts to a reduction

of 11 percent of all of Burghardt's grazing privileges under its grazing permit for a period of 2 years. The BLM argues that the suspension of all of Burghardt's fall/winter grazing privileges in the two allotments for 2 years is not out of line with the Board's decision in Brinkerhoff, wherein we provided for a 20-percent reduction in grazing privileges for 2 years in the case of a willful and repeated trespass. The BLM suggests that had Judge Sweitzer looked at Burghardt's total privileges in the Boise District or its total active privileges in the Battle Creek and Castle Creek allotments, he would not have concluded that the penalties were too harsh, and therefore would have sustained the penalties imposed by BLM. We reject that inference.

It is clear from the record that Judge Sweitzer had before him all the facts concerning the nature and extent of Burghardt's grazing privileges in the Boise District and in the two allotments at issue when he issued his decision. In the absence of evidence compelling a different conclusion, we accept Judge Sweitzer's conclusion that the penalties imposed by BLM were too severe in light of all the circumstances and evidence adduced at the hearing in this matter.

The considerably shorter length of the current trespass and the minor history of past trespasses distinguishes the instant case from Brinkerhoff, *supra* (20-percent reduction for 2 years); Calvin C. Johnson, *supra* (10-percent reduction for 3 years); Cesar Siard, 26 IBLA 29 (1976) (10-percent reduction for 3 years); John E. Walton, *supra* (20-percent reduction for 2 years); or Clarence S. Miller, 67 Interior Dec. 145 (1960) (20-percent reduction for 5 years). Burghardt did not display the continuing and flagrant indifference to compliance with Federal restrictions on grazing use evident in Eldon L. Smith, 8 IBLA 86 (1972) (100-percent reduction for 3 years); Alton Morrell & Sons, 72 Interior Dec. 100 (1965) (40-percent reduction for 5 years); and Eugene Miller, 67 Interior Dec. 116 (1960) (100-percent reduction for 2 years).

However, we will not limit the penalty, as Judge Sweitzer did, to a 15-percent reduction in fall/winter grazing privileges in the two allotments (*i.e.*, 51 AUM's) for 2 years. This amounts to only a 1.67-percent reduction in Burghardt's grazing privileges under its permit. Plainly, a minimal reduction in grazing privileges for 1 or 2 years is not warranted in view of the fact that Burghardt had, in October 1988, a history of nonwillful trespasses and the last trespass was willful and hardly insignificant.

Something short of an 11-percent reduction in grazing privileges is a more appropriate penalty. We conclude that Burghardt should be subject to a 5-percent reduction in grazing privileges for a period of 3 years. This means that Burghardt's authorized grazing use of 3,050 AUM's will be reduced by 5 percent (*i.e.*, 153 AUM's) for 3 years. We believe that such a penalty is commensurate with Burghardt's trespass in October 1988, and is better designed to promote the orderly use of the Federal range, as

required by section 2 of the Taylor Grazing Act, 43 U.S.C. § 315a (1994). Alton Morrell & Sons, supra at 109. Judge Sweitzer's September 1991 decision is modified accordingly.

In the case of the December 1989 trespass, Judge Sweitzer properly found that it was "both willful and repeated," that 99 cattle is a fairly large number, and that the period of the trespass (i.e., 1 day) was not fairly long. Decision at 11. While a permanent cancellation of all of Burghardt's grazing privileges in the Battle Creek allotment or both the Castle Creek and Battle Creek allotments is unwarranted because the Brinkerhoff test has not been met squarely, for the same reason, a suspension of all of Burghardt's grazing privileges in the two allotments would not be warranted. However, more than a suspension of Burghardt's fall/winter grazing privileges in the two allotments (i.e., 342 AUM's or 11 percent of all of Burghardt's grazing privileges) for 2 years is appropriate since the threat of such a suspension as early as May 1989 clearly was not sufficient to persuade Burghardt to make a diligent effort to keep its cattle from unauthorized grazing on public lands. It thus is appropriate to suspend 15-percent of Burghardt's total grazing privileges of 3,051 AUM's, i.e., 457 AUM's, for 3 years, to run with the first penalty concurrently, the net effect of which is a 15-percent reduction of total privileges or 457 AUM's for 3 years. Judge Sweitzer's September 1991 decision is modified accordingly.

In conclusion, Judge Sweitzer's decision is affirmed in all respects, except that the penalty for the October 1988 trespass is modified such that Burghardt's authorized grazing use in the Boise District (3,051 AUM's) is reduced by 5 percent (153 AUM's). With respect to the 1989 trespass, 15 percent (457 AUM's) of Burghardt's grazing privileges (3,051 AUM's) is suspended for 3 years, both penalties to run concurrently, the net effect of which is a 15-percent reduction of total privileges, or 457 AUM's for 3 years.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

T. Britt Price
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

